Supreme Court, U.S.
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No. 99-1962

IN THE

Supreme Court of the United States

COLLINS ENTERTAINMENT, INC. and
192 COIN-OPERATED VIDEO GAME MACHINES, etc., *et al.*,

Petitioners,

v.

SOUTH CAROLINA LAW ENFORCEMENT DIVISION
and THE STATE OF SOUTH CAROLINA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. 192 coin-operated machines

On December 23, 1997, Special Agent Asbill of the South Carolina Law Enforcement Division, (hereinafter "SLED"), brought before Magistrate Diane Cagle affidavits which contained sworn statements that they had observed illegal gaming machines in two warehouses owned and operated by the petitioner, Collins Entertainment Inc. The affidavits included testimony of two agents of SLED, who had been contacted by a confidential informant stating that he had observed illegal gambling machines and devices at both locations. SLED agents, acting upon this information, went to 1341 Rutherford and Brandon Mills in an undercover capacity purporting to be buyers of gaming equipment. While at the both premises, the SLED agents observed for themselves that there was illegal gaming equipment, including gambling machines and their respective component parts in violation of S.C. Code Ann. § 12-21-2710, at both 1341 Rutherford and Brandon Mills.

Pursuant to these affidavits and the sworn testimony of Special Agent Asbill, Magistrate Diane Cagle issued search warrants for the premises located at 1341 Rutherford Road and the Brandon Mills Storage Facility. Upon issuance of the search warrants, agents of SLED executed the search warrants for the 1341 Rutherford and Brandon Mills premises and seized 192 coin-operated video machines property pursuant thereto. Magistrate Cagle then went to the two warehouses herself and examined the seized machines and their respective component parts and determined that such were in violation of S.C. Code Ann. § 12-21-2710. Specifically, Magistrate Cagle found that the machines

registered various amounts of winnings depending upon which combination of various symbols are displayed after a coin is deposited and a button is pushed. She further found that these machines required no skill on the part of the player or operator. Having determined that the machines were in violation of S.C. Code Ann. § 12-21-2710, Magistrate Cagle ordered their destruction. Her findings that the machines were in violation of § 12-21-2710 and required destruction were premised upon careful consideration of *State v. Four Video Slot Machines*, 453 S.E.2d 896 (S.C. 1995) and *State v. One Coin Operated Video Machine*, 467 S.E.2d 443 (1996).

The petitioner filed a notice of appeal and memorandum of law challenging the findings and order of Magistrate Cagle. The petitioner's appeal contained fifteen exhibits, including affidavits of three Collins employees, a letter from the previous Solicitor, and fifteen newspaper articles. The Honorable Judge Thomas Ervin heard extensive oral arguments from both the petitioner and Respondent at a hearing in January of 1998. During the oral argument, the petitioner made repeated reference to these exhibits including the sworn testimony and letter from the solicitor. There was no limitation placed on these exhibits and the petitioner was free to include the affidavits of other parties as well. On March 4, 1998, the Honorable Judge Thomas Ervin issued an order affirming the Magistrate's Order of Destruction and dismissing the Appellant's Appeal with Prejudice. (Trial Court's Order dated March 4, 1998). The trial court continued the stay of destruction pending the exhaustion of all appeals. (Trial Court's Order dated March 4, 1998).

B. 23 coin-operated machines

On January 14, 1998, agents with SLED seized 23 coin-operated machines pursuant to a search warrant issued on the same date. While executing a previously issued search warrant for 192 coin-operated machines to be found on the premises of 1341 Rutherford and Brandon Mills, agents with SLED found in plain view and in the same general area, 23 additional illegal coin-operated machines. In that the agents with SLED were lawfully on the premises consistent with the previous search and seizure warrant, the agents determined that there was sufficient time and opportunity to obtain an additional search warrant for the newly discovered 23 coin-operated machines.

The SLED agents went before Magistrate Etta Reid to secure an additional search warrant. The SLED agents presented Magistrate Reid with affidavits, which contained testimony that the agents, while lawfully on the premises to execute the previous search warrant, had personally observed the additional 23 illegal coin-operated machines to be on the property. Magistrate Reid issued a search warrant for the additional 23 illegal coin-operated machines; which set forth with the requisite specificity the premises to be searched and the property sought.

The machines were seized and brought before Magistrate Reid. Magistrate Reid closely examined the additional 23 machines and found them to be in violation of § 12-21-2710 and ordered their destruction. Specifically, Magistrate Reid set forth in her order of destruction that the 23 machines she examined register varying amounts of winnings depending upon which combination of various symbols are displayed after a coin is inserted and a button is

pushed. She further determined that the machines required no skill on the part of the player or operator. Magistrate Reid also considered and premised her decision on this Court's decisions in *State v. Four Video Slot Machines*, 453 S.E.2d 896 (1995) and *State v. One Coin Operated Video Machine*, 467 S.E.2d 443 (1996).

Both the Appellant and Respondent agreed that the issues raised in the appeal of the Magistrate Reid's order of destruction of the 23 coin-operated machines were substantially similar to those issues and raised on the appeal of the initial 192 coin-operated machines. Judge Ervin properly determined that the court need not hear any additional oral arguments concerning the appeal of the 23 coin-operated machines. The trial court then affirmed Magistrate Reid's Order of destruction on June 9, 1998 and dismissed the Appellant's appeal with prejudice. Again, the Court ordered the stay of the destruction of the machines pending the exhaustion of appeals.

The South Carolina Supreme Court granted the Appellant's Motion to Consolidate the appeals of the Orders of Destruction of the 192 and 23 coin-operated machines; to which the Respondent consented. The Supreme Court of South Carolina provided the petitioner with a second opportunity for hearing at which to present both oral and written argument to the court. After considering both written and oral argument, the South Carolina Supreme Court entered a judgment denying all seventeen issues raised on appeal by the petitioner on February 7, 2000. The Court then denied rehearing on March 9, 2000. The petitioner filed their writ of petition for certiorari on June 6, 2000.

REASONS FOR DENYING THE WRIT

I.

THE PETITIONER IS RAISING A NOVEL ARGUMENT, ONE THAT WAS NOT RAISED AT THE COURTS BELOW.

The petitioner presents the question of whether deprivation of property, without any opportunity to be heard, either before or after seizure, violates due process. The petitioner never raised such an issue, nor objected to such process, at the courts below. The sole due process issue presented by the petitioner at the state appellate court and the South Carolina Supreme Court was:

> Whether Appellant's right to the procedural due process guaranteed by the federal and state constitutions has been violated because no hearing was held *prior* to the issuance of the destruction orders.

Final Brief of the Appellant, p. 1. Thus, the substance of the petitioner's argument below was solely to challenge existing jurisprudence regarding whether the petitioner was entitled to a pre-seizure hearing.

At the courts below, the petitioner exclusively challenged the statutory design of S.C. Code Ann. § 12-21-2710's provision for a post-seizure hearing. Final Brief of the Appellant, p. 1. More specifically, the petitioner contested the legislature's policy considerations behind the post-seizure hearing provision of S.C. Code Ann. § 12-21-2710 as not being present when the nature of

contraband allegedly does not present the immediate threat to the public health and welfare. Final Brief of the Appellant, p. 10, *citing State v. Kizer*, 162 S.E.2d 444 (1932); and *Sentell v. R. Co. R.*, 166 U.S. 698 (1897). The South Carolina Supreme Court properly rejected this challenge affirming there is no due process violation to a statutory scheme providing for a post-seizure hearing involving illegal gambling machines which the legislature has determined do present an immediate and substantial threat to the public health and welfare. *See Moore v. Timmerman*, 276 S.E.2d 290 (1981); *Myers v. Real Property at 1518 Holmes Street*, 411 S.E.2d 209 (1991); *Allen v. Tucker*, 715 F. Supp. 266, 268 (E.D. Mo. 1989); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

The petitioner never questioned or otherwise objected to the discretionary nature of the post-seizure hearing which gives due deference to the magistrate's findings of fact regarding the illegality of the property in question. Final Brief of the Appellant, pp. 8-16. When the Honorable Judge Ervin duly informed the petitioner that the post-seizure hearing was not de novo and that the court would give due deference to the magistrate's findings, the petitioner raised no objection and failed to solicit the opportunity to present witnesses. Record on Appeal, p. 347. Accordingly, the South Carolina Supreme Court addressed the more limited question of whether the petitioner was entitled to a pre-seizure hearing in conformance with the requirements of due process. Appendix, pp. 22a-24a.

The petitioner, in no doubt recognizing that certiorari review of this well-established principle would meet with little success, has therefore modified its original argument of whether due process requires a either a pre-seizure or

post-seizure hearing including the de novo opportunity to present witnesses Therefore, the petitioner's issue is beyond consideration of this Court where it cannot be said that: "a state court of last resort has decided an important decided an important question of federal law;" because neither of the lower courts have decided this novel issue. *See* Supreme Court Rule 10 (1999). Where neither the intermediate appellate court nor the state court of last resort has addressed the particular aspect of the adequacy of the post-seizure hearing, due to the petitioner's failure to raise the issue, the Court should not consider the issue in the first instance on petition for certiorari. *Gilbert v. Homar*, 520 U.S. 924, 935 (1997).

II.

THE PETITIONER WAS AFFORDED A MEANINGFUL OPPORTUNITY TO BE HEARD.

The Supreme Court should deny the petition for certiorari where the petitioner was afforded a full and meaningful opportunity to be heard. The petitioner was granted a hearing by both the appellate court and the South Carolina Supreme Court. At both levels, the petitioner was afforded the opportunity to present both written and oral argument regarding the illegality of the machines, the orders of the magistrates, and the basis for returning the property to Collins Entertainment. (Record on Appeal, pp. 347-413). Additionally, the petitioner submitted numerous exhibits, including the sworn testimony of two Collins employees regarding the nature of the property and the circumstances surrounding the seizure. There was no limitation placed on the number of exhibits, the number of affidavits, nor the subject matter of the same. Thus, the petitioner should not

be permitted to question now that which it failed to proffer when provided the full and appropriate opportunity to do so.

Moreover, the petitioner's question of law regarding the opportunity to present testimony ignores the factual reality that there was no question regarding the illegality of the machines. The petitioner conceded the illegality of the machines in an affidavit by the owner of Collins Entertainment as noted by the South Carolina Supreme Court. *See* Appendix A, p. 23a; Record on Appeal, Affidavit of Freddie Collins, pp. 254, 255. In so doing, the petitioner acknowledged that there were no questions of fact about which to present factual testimony pertaining to the nature and operation of the machines. The petitioner consented that the only issues were questions of law regarding the actions of the magistrate, alleged violations of state and federal constitutional rights, any federal exemptions for the otherwise state prohibited property, and interpretation of South Carolina statutes governing the possession and operation of certain gambling machines.

Finally, the very nature of this proceeding, an *in rem* proceeding involving illegal gaming machines or contraband per se, contradicts any notions regarding the need for testimony where the nature of the contraband, its outward physical properties, are the sole question before court. *See* Appendix A, p. 12a. The petitioner's call for a hearing permitting the examining of witnesses is moot where there is no testimony or witnesses to proffer regarding the objective examination by the magistrate of the gaming machines. Indeed, even in the petition for certiorari, there is no proffer or extrapolation on the nature or subject of testimony, which the petitioner claims it was deprived of presenting. Thus, the Supreme Court should deny the petition for certiorari

where it raises a moot question of law pertaining to a non-contested question of fact.

III.

THE POST-SEIZURE HEARING PROVIDED THE PETITIONER SATISFIED ANY AND ALL REQUIREMENTS OF BOTH THE STATE AND FEDERAL GUARANTEES OF DUE PROCESS.

The petitioner was afforded two opportunities, at the intermediate appellate level and at the state court of last resort to raise any issues contesting the seizure and order of destruction of the illegal video gaming machines. The petitioner raises anew the objection that because there was no opportunity to present witnesses, there has been some violation of the federal and state guarantees of due process. However, the petitioner has failed to demonstrate how the guarantees of due process require the opportunity to examine any such witnesses.

Due process clearly requires notice and opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385 (1914). How much notice and what opportunity must be afforded is a balancing decision to made by the court based upon the competing interests involved and the likelihood that error has been made. *California Workers v. McElroy*, 367 U.S. 886, 895 (1961). Repeatedly, courts have held that a post-seizure hearing adequately affords a property owner the requisite due process. *See Moore v. Timmerman*, 276 S.E.2d 290 (1981); *Myers v. Real Property at 1518 Holmes Street*, 411 S.E.2d 209 (1991); *Allen v. Tucker*, 715 F. Supp. 266, 268 (E.D. Mo. 1989); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). The specific question

raised by the petitioner is whether the hearing must afford the opportunity to examine witnesses.

Unfortunately, the cases relied upon by the petitioner simply fail to substantiate any constitutional mandate for an opportunity permitting the examining of witnesses. In *Gilbert v. Homar*, cited by the petitioner, the Court merely held that prior to suspending an officer, the officer must be afforded notice and a post-suspension hearing at which time the officer could contest the charges against him. 520 U.S. 924 (1997). Petitioner's reliance on *Wolf v. McDonnell* is further misplaced where it merely states that prison boards seeking to deprive a prisoner of good time credit, could, if security measures permitted, allow the prisoner the privilege to present witnesses if so indicated by the evidence. 418 U.S. 539, 565 (1974). Despite the citations of the petitioner, the *Wolf* Court specifically held that the mandates of due process do not require an opportunity to examine witnesses, nor the opportunity to confront or cross-examine witnesses. *Id.* Similarly, in the case of *Goss v. Lopez*, also relied upon by the petitioner, the Court stopped short of mandating that the suspended student be afforded a trial like process involving counsel, examining witnesses, and cross-examining accusers. 419 U.S. 565 (1975). Instead, the *Goss* Court deferred to state and local governments to establish procedures affording the student the requisite notice and opportunity to be heard commensurate with the nature and duration of suspension, which may, but need not include the examining of other witnesses. *Id.* Thus, the jurisprudence relied upon by the petitioner fails to substantiate the claim that due process mandates that an opportunity to be heard involve the opportunity to present witnesses. Instead, existing case law merely indicates in dicta that in some types of proceedings, due process may need extend the privilege of examining

witnesses where necessary to resolve certain issues subject to mischaracterization and error.

In the case sub judice, the opportunity to present witnesses is not intrinsic to nature of the hearing regarding the illegality of the contraband per se. The illegality of the contraband was properly determined by the physical characteristics of the machines as examined by the magistrate, consented to by the owner of the property submitted in an affidavit of the owner and petitioner, Freddie Collins, and not a subjective issue subject to frequent error or mistake. The issue may be different in the instance of derivative contraband where the owner of the property may require the opportunity to present evidence and testimony demonstrating to the court that the owner was not aware that the derivative contraband was being utilized in illegal activity. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). In contrast, where the contraband at issue is illegal narcotics, weapons, gaming equipment, or contaminated food, such that the physical nature of the contraband can be readily determined by an objective examiner, there is no need for superfluous testimony.

Therefore, factual testimony regarding the physical aspects of contraband per se will likely add little to the hearing nor be necessary to evaluate the objective determination by the magistrate that the property is illegal. Accordingly, due process does not mandate that in a hearing contesting the seizure and destruction of contraband per se, the petitioner be afforded an opportunity to examine witnesses.

In all instances cited by the petitioner, the United States Supreme Court has deferred to lower courts, state

legislatures, prison boards, and school disciplinarians to establish a procedure where the opportunity to present witnesses is a privileged extended by the adjudicator when mandated by the facts and circumstances of the case. This Court should again defer to the lower courts and state legislatures to similarly establish procedures regarding the necessity of an opportunity to present witnesses at a hearing involving the seizure and destruction of contraband per se.

CONCLUSION

For the reasons cited, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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